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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,

Petitioner,

VS.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF OF 32 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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November 30, 1989

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INTRODUCTION

The States of Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming (hereinafter "Amici States") submit this brief in support of the State of California. The Amici States respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit in *California v. American Stores*[1] be reversed.

INTEREST OF THE AMICI STATES

States represent a significant force in antitrust enforcement. Even before the federal government had antitrust authority, the states were vigorously protecting this country's free enterprise system. By the time the Sherman Act was enacted, 21 states had already adopted antitrust statutes. *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1665 n.4 (1989).

The states' attorneys general are under a mandate to enforce federal and state antitrust laws, including Section 7 of the Clayton Act. The Amici States, therefore, have a substantial interest in seeing that federal court application of antitrust laws is consistent with underlying congressional intent, this Court's past decisions, and sound public policy.

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[1] *California v. American Stores Co.*, 872 F.2d 837 (9th Cir.), *cert. granted*, 110 S.Ct. 275 (U.S. October 16, 1989) (No. 89-258).

The Amici States support the State of California's contention that divestiture is a remedy available to states and private plaintiffs under Section 16 of the Clayton Act. In *California v. American Stores*, the Ninth Circuit held that divestiture is not available as a remedy to California as a private plaintiff. In so holding, the Ninth Circuit substantially impaired the ability of states and private plaintiffs to enforce the Clayton Act in the manner intended by Congress, and the court perpetuated a split among the circuits.

SUMMARY OF ARGUMENT

1. *American Stores* offends public policy and is contrary to the clear intent of Congress. In denying the divestiture remedy to the State of California, the Ninth Circuit draws an untenable distinction between the remedies afforded private and public plaintiffs. The distinction is especially arbitrary when one considers that the so-called "private" plaintiff in this case is a state, representing public rather than private interests.

2. This Court has recognized that divestiture is often the most effective remedy available to redress the anticompetitive effects of an illegal merger. A merger that violates the Clayton Act distorts the market. Only the divestiture remedy restores competition to its premerger status.

3. Congress intended states and private parties to play key roles in enforcing the Clayton Act. By denying states and private parties the only effective remedy, divestiture, *American Stores* severely limits the efficacy of such private enforcement actions, leaving enforcement of the Clayton Act solely in the hands of the federal government.

4. If this Court decides that the divestiture remedy should not be available to parties with purely private interests to vindicate, the remedy should nonetheless be available to states, such as California, which represent public rather than private interests. States, when acting in their *parens patriae* capacity, are "government" in the same sense as the Federal Department of Justice and the Federal Trade Commission and should be afforded the same remedies that are granted to the federal government, including divestiture.

ARGUMENT

I. CONGRESS INTENDED STATES AND PRIVATE PARTIES TO PLAY KEY ROLES IN ENFORCING THE CLAYTON ACT.

Section 7 of the Clayton Act prohibits the acquisition of stock or assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1989). Sections 4 and 16 of the Clayton Act provide for private rights of action.[2] 15 U.S.C. §§ 15 and 26 (1989). This Court has held that states have standing to bring *parens patriae* actions seeking injunctive relief under

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[2]Section 4 provides for treble damages, while Section 16 authorizes injunctive relief. Section 16 reads in part:

> Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . .

15 U.S.C. § 26 (1989)

Section 16 of the Clayton Act. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447-49, 65 S.Ct. 716, 721-22 (1945); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260, 92 S.Ct. 885, 890 (1972). Section 4C of the Clayton Act grants states the right to bring *parens patriae* damage actions on behalf of consumers in their states. 15 U.S.C. § 15C.

Private parties were given treble damage and injunctive remedies, in part, to serve the "high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580 (1969). "Courts have long recognized that Congress intended private antitrust suits both to provide a remedy to injured parties and to enlist the business public as private attorneys general to aid the government in 'achieving the broad social object of the statute.'" *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 415 (1st Cir. 1985) (citation omitted). The significance Congress placed upon the private plaintiff injunctive remedy is reflected by the following statement made by one of the authors of the Clayton Act during consideration of the bill:

> First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individual was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So . . . the committee, proposed to place in this bill a law which allows the individual to sue for equitable relief and to enjoin monopoly when he is threatened with irreparable loss or damage.

51 Cong. Rec. 9270 (daily ed. May 26, 1914) (statement of Rep. Carlin). Congress clearly intended that private parties would play an integral role in antitrust enforcement.

State attorneys general play a special role in this enforcement scheme. Many are charged under their respective state laws with powers and responsibilities similar to those granted by federal law to the Federal Trade Commission ("FTC") and the United States Department of Justice.[3] Additionally, state attorneys general are particularly well suited to investigate and prosecute mergers with predominantly local impact, given their knowledge of local business conditions and their responsibility to the citizens of their states. Congress recognized the special role state attorneys general should play in antitrust enforcement when it granted the state attorneys general the authority to bring federal *parens patriae* damage actions under the Clayton Act. 15 U.S.C. § 15C.

II. THE HOLDING IN *AMERICAN STORES* SEVERELY LIMITS THE EFFICACY OF PRIVATE ENFORCEMENT UNDER THE CLAYTON ACT, CONTRARY TO THE CLEAR INTENT OF CONGRESS.

The Ninth Circuit's decision in *American Stores* severely weakens the right of action granted to private parties and the states under the Clayton Act and

[3] *See, e.g.*, Ariz. Rev. Stat. § 44-1407 (1987); Cal. Bus. & Prof. Code § 16754 (1987); Fla. Stat. § 542.27 (1988); Mass. Gen. Law ch. 93, § 9 (1985); Minn. Stat. § 8.31 (1988); N.Y. Gen. Bus. Law § 342-9 (1988); Ohio Rev. Code § 1331.11 (1979); Tex. Bus. & Com. Code § 15.20 (1989).

perpetuates a split among the circuits.[4] In *American Stores*, the Court of Appeals held that "divestiture, whether direct or indirect, is not an available form of relief under Section 16 for a private party such as California." 872 F.2d at 845. The *American Stores* Court relied entirely upon earlier Ninth Circuit precedent. *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355 (1976).

A. There Is No Credible Evidence To Indicate That Congress Intended To Deprive Private Plaintiffs Of The Divestiture Remedy.

In the *International Telephone & Telegraph Corp.* case, the Ninth Circuit concluded that the term "injunctive relief" contained in Section 16 was ambiguous. 518 F.2d at 921. It then determined, on the basis of "legislative history," that Congress had not intended divestiture as one of the equitable remedies available under Section 16 to private plaintiffs. *Id.* at 922.

The legislative history relied upon by the *IT&T* court consisted of two isolated statements made during

[4]In a 1985 decision, the First Circuit held that divestiture is a remedy available under Section 16 of the Clayton Act. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean Inc.*, 754 F.2d 404, 414 (1st Cir. 1985). Several lower courts have also held that the divestiture remedy is available to private parties. *Consolidated Gold Fields, PLC v. Anglo American Corp.*, 1989-1 Trade Cas. (CCH) Para. 68,536 (S.D.N.Y. 1989); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F.Supp. 1250, 1255-56 (E.D. Pa. 1987); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F.Supp. 780, 797 (S.D. Tex. 1971), *aff'd on other grounds*, 476 F.2d 989 (5th Cir. 1973).

committee hearings.[5] *Id.* Neither statement referred to the remedy of divestiture. Both statements, instead, referred to dissolution. Nonetheless, the Ninth Circuit surmised that "if any specific equitable remedy was in the minds of the members of the committee" during consideration of the Clayton Act, that remedy was divestiture. *Id.* at 923. As the First Circuit Court of Appeals noted in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), "dissolution" has a much broader meaning than "divestiture." *Id.* at 421. At least two members of Congress "apparently equated dissolution with the complete destruction and reorganization of an offending corporation." *Id.* "Thus, even within Congress, there existed a difference of opinion as to what the remedy of dissolution entailed." *Id.* Congress, as a legislative body, therefore had no "clearly expressed legislative intent" to deprive a district court of the remedy of divestiture in a suit brought under Section 16 of the Clayton Act. *Id.* at 422. Without such a clearly expressed legislative intent, a court may not limit or displace a statute's meaning. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980).

When a court's equity jurisdiction is at stake, even more legislative clarity of contrary intent is required:

[5]The first was a statement made during Committee consideration of the Clayton Act by Congressman John Floyd: "We did not intend by Section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has. . . . We discussed that very thoroughly among ourselves and we decided he should not have [it]." 518 F.2d at 922. The second statement, according to the Ninth Circuit, was made in an "exchange between Representative Charles Carlin and witness Louis D. Brandeis." *Id.*

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S.Ct. 1086, 1089 (1946) (quoting *Brown v. Swann*, 10 Pet. 497, 503, 9 L.Ed. 508 (1836)); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1803-04 (1982). Section 16 directly invokes the court's equitable powers.

The Ninth Circuit in *IT&T* relied upon two isolated statements made in committee to ascertain the "intent of Congress." 518 F.2d at 922. This Court has cautioned against relying upon "such isolated fragments of legislative history in divining the intent of Congress." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342-43, 102 S.Ct. 1096, 1102 (1982). It is especially dangerous to rely upon such isolated fragments of legislative history when that history is voluminous. The legislative history of the Clayton Act consists of approximately 3,000 pages of committee reports, hearings, and debate. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 418 (1st Cir. 1985). Two isolated statements appearing in such a voluminous record can hardly comprise a "clear and valid legislative command." Without such a clear and valid legislative command, the equity power of courts may not be limited.

The First Circuit examined the legislative history of the Clayton Act to determine whether Congress intended that the divestiture remedy be broadly available under Section 16 of the Clayton Act. *Cia. Petrolera*, 754 F.2d at 418-29. In a most comprehensive fashion, the First Circuit examined the committee reports, floor debates, conference committee reports, and committee hearings. *Id.* Based upon its analysis, the court then rejected the Ninth Circuit's holding in the *IT&T* case. *Id.* at 428. The First Circuit found the legislative history as to contrary intent to be inconclusive. *Id.* The court concluded that equity jurisdiction included the power to order divestiture in appropriate cases brought by private plaintiffs. *Id.* at 429. In so holding, the First Circuit considered the plain language of Section 16,[6] the legislative history and goals[7] of the Clayton Act, the powers of a court in

[6]The court compared "the language Congress utilized in granting the government the power to obtain equitable relief, § 15 of the Clayton Act, to that used in § 16." 754 F.2d at 417 (citation omitted). It was "unable to discern from the plain language of these statutes any intended distinction. . . ." *Id.* at 418.

[7]The Court stated: "Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals. . . . Our reliance on this principle of statutory construction here is especially appropriate because the Sherman and Clayton Acts were drafted in broad terms to defeat an evil that Congress knew could take many forms. . . . On the floor of neither the Senate nor the House, nor in any committee report, is there a single reference to any limitations or restrictions on § 16 "injunctive relief" which would negate the plain language or the sponsors' broad explanations of the provision. Accordingly, we decline to engraft judicially a *per se* limitation on § 16 forbidding an order for divestiture." 754 F.2d at 428-29.

equity, and the effectiveness of the divestiture remedy. *Id.* at 413-30.

B. Divestiture Is The Most Effective Remedy Available To Redress An Anticompetitive Merger.

Without the remedy of divestiture, the states and private plaintiffs are effectively precluded from enforcing Section 7 of the Clayton Act. Frequently, as in the *American Stores* case, it is not feasible for a state or private party to file suit before a merger is consummated. The "symptomatic" remedies permitted by the Ninth Circuit in such cases cannot correct the harm produced by illegal mergers. Divestiture alone protects society against the evil created by an unlawful merger. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961); *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128-29, 68 S.Ct. 947, 957 (1948).

This Court has recognized the importance of the divestiture remedy. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327-30, 81 S.Ct. 1243, 1251 (1961).

> The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved.
>
> . . . .

> Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of Section 7 has been found.

366 U.S. at 330-31, 81 S.Ct. at 1251-53 (footnotes omitted).

Legal commentators have also recognized the effectiveness of divestiture. *See, e.g.* Kintner, *Federal Antitrust Law* V:40.32 n.963 (1984); P. Areeda, *Antitrust Analysis* 57, n.139 (2d Ed. 1974); Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief*, 19 Pac. L. J. 143, 146 (1987); Note, *Divestiture as a Remedy in Private Actions Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579 (1986); Note, *The Use of Divestiture in Private Antitrust Suits*, 43 Geo. Wash. L. Rev. 261, 279-80 (1974); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 Minn. L. Rev. 267, 274-75 (1964). "Because unlawful mergers involve a structural antitrust violation, structural relief, such as divestiture, is often the most appropriate remedy. . . . A successful divestiture provides the greatest assurance that an unlawful merger will not lead to anticompetitive results." 84 Mich. L. Rev. at 1589. When a merger takes place which violates the Clayton Act, it distorts the market; only the divestiture remedy restores competition to its premerger status.

A remedy that is ineffective is really no remedy. The remedial phase of an antitrust case is crucial. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323, 81 S.Ct. 1243, 1249 (1961).

> [T]he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If the decree accomplishes less than that the Government has won a lawsuit and lost a cause."

Id. Accordingly, divestiture, the most important of antitrust remedies, should be obtainable by the states and private parties.

C. Equity Jurisprudence Dictates That The Divestiture Remedy Be Available To Courts In Cases Brought Under Section 16 Of The Clayton Act.

An injunction is an equitable remedy. *Weinberger*, 456 U.S. at 311, 102 S.Ct. at 1803. Equity jurisdiction has a "background of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 591-92 (1944). This Court has characterized the fluidity of the court's power in equity:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-30, 64 S.Ct. at 592.

None of these concepts was new or novel when Congress enacted Section 16 of the Clayton Act and provided for injunctive relief. It was true then as it is today that a court's equitable jurisdiction is not to be limited unless there is a "clear and valid legislative command" of such limitations. *Weinberger*, 456 U.S. at 313, 102 S.Ct. at 1803-04. As discussed in Section II A of this Brief, there is no such legislative command in the instant case. Courts should be allowed, therefore, to grant the relief they find most appropriate under the facts of the cases before them. If this Court decides that the divestiture remedy is available to private parties under Section 16, it is still within the discretion of the district court to grant or deny such relief based upon the "necessities" of the particular case.

D. Public Policy Dictates That The Divestiture Remedy Be Available To Courts Regardless Of Whether The Plaintiff Is The Federal Government Or A Private Plaintiff.

Neither the legislative history of the Clayton Act, the plain words of the statute itself, nor general principles of equity suggest that the divestiture remedy be denied to private plaintiffs or states under Section 16. Indeed, the statutory language, general equitable principles, the goals of the Clayton Act, and public policy considerations mandate that courts be permitted to order the most effective remedy without regard to whether the plaintiff is the federal government, a state government, or a private plaintiff. Divestiture provides the greatest, and frequently the only, assurance that an illegal merger will not lead to an anticompetitive marketplace.

Congress granted private parties rights of action under the Clayton Act, in part, to encourage private parties to assist in enforcing the Clayton Act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580 (1969). "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138, 88 S.Ct. 1981, 1984 (1968). The federal government alone cannot adequately enforce the Clayton Act. Its resources are limited. Furthermore, prosecutorial discretion allows the federal government to proceed or not proceed at will as it chooses.

> Where the government fails to enforce certain antitrust laws, private actions can assure that violations of these laws are brought before the courts. In this way, private litigation serves to further the development of the antitrust laws. In creating a private right, Congress necessarily intended private parties to play this vital role. Courts should not allow the government agencies alone to determine, through their enforcement policies, the substance of antitrust law.

Note, *Divestiture as a Remedy in Private Actions Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579, 1595 (1986) (footnotes omitted).

The Ninth Circuit in the instant case seemed to recognize that its decision had a negative effect on the private party cause of action. The court claimed, however, that its holding would not place the states and private plaintiffs in "an untenable position," since

suit could be filed before a stock sale has been completed. 872 F.2d 846. By so stating, the Ninth Circuit ignores public policy and economic reality, and most importantly, sends a dangerous message to the business community.

In *Cia. Petrolera Caribe, Inc.*, the First Circuit addressed the danger inherent in such a distinction:

> [I]t is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated.

754 F.2d at 430.

Furthermore, states and private plaintiffs do not always have access to the information necessary to analyze mergers before the transactions are completed. For example, state attorneys general are not permitted access to Hart-Scott-Rodino filings directly from the federal government. *Lieberman v. FTC*, 771 F.2d 32, 37-38 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985).[8]

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[8]Although many states have the power under their statutory law to obtain documents from the merging parties, *see, e.g.*, Tex. Bus. & Com. Code §15.10, such pre-complaint discovery power is often too slow in the fast-paced world of merger activity. Private parties other than states do not have such subpoena power.

Even if essential information is available, the analysis required to determine whether a merger should be challenged is often too complicated to be accomplished within the narrow "window of opportunity" established by the Ninth Circuit in *American Stores*. As a matter of public policy, antitrust law should not require suit before the time when filing is "responsibly possible." Indeed, the Ninth Circuit's holding may often unfairly force private plaintiffs to weigh the threat of sanctions against the loss of their only effective remedy, divestiture. *See* Fed. R. Civ. P. 11. Moreover, the decision forces private and state plaintiffs to act prior to completion of any federal review process. Cooperation between state and federal law enforcement authorities should be encouraged by the courts, not discouraged.

The facts in the instant case demonstrate the difficulties created by the Ninth Circuit's decision. The district court found that California had "conducted this investigation as swiftly as was responsibly possible." *American Stores*, 697 F.Supp. 1125, 1135 (C.D. Cal. 1988), *rev'd*, 872 F.2d 837 (9th Cir.), *cert. granted*, 110 S.Ct. 275 (U.S. October 16, 1989) (No. 89-258). The district court also found that California was participating in the "premerger" review procedure established by the Hart-Scott-Rodino Act. 697 F.Supp. at 1135. California submitted comments to the FTC analyzing the merger and recommending that the FTC withdraw its proposed consent agreement. *Id.* The district court found that it was not "unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval." *Id.*

The record reveals that the FTC approved the merger in the instant case on August 31, 1988, and California filed suit the next day. *Id.* To accept the Ninth Circuit's assertion that "California could have

sued several months earlier and attempted to enjoin the merger," 872 F.2d at 846, one must acknowledge that California would have had to do so without regard for the FTC review. By participating in the FTC review, California was attempting to protect competition for its citizens, while also cooperating with the federal government. The Ninth Circuit's decision requires such future cooperation to be exercised by states at the risk of losing the most effective remedy, divestiture.

III. THE DIVESTITURE REMEDY SHOULD BE AVAILABLE TO STATES, SUCH AS CALIFORNIA, WHICH REPRESENT PUBLIC RATHER THAN PRIVATE INTERESTS.

If this Court decides that the divestiture remedy should not be available to parties with a purely private interest to vindicate, the Amici States respectfully contend that the remedy should nonetheless be granted to states, such as California, which represent public rather than private interests. If a distinction is to be drawn between private and public plaintiffs, states should be considered public parties.

California brought the instant lawsuit as *parens patriae* on behalf of its citizens. This Court has long recognized the states' standing to bring such suits for injunctive relief under federal antitrust laws. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447-49, 65 S.Ct. 716, 721-22 (1945). In so doing, the Court has drawn a significant distinction between the proprietary interest of states or private citizens and the public interest of states.[9] *Id.*; *Kansas v. Colorado*, 206 U.S. 46, 98-99, 27

[9] "Here Georgia asserts rights based on the anti-trust laws. . . . As we have seen Georgia sues as a proprietor to redress wrongs suffered by it as the owner of various public institutions. . .

(Footnote continued on next page)

S.Ct. 655, 668 (1907). This public interest distinction should be equally applicable to remedies.

In the instant case, the Ninth Circuit denied California's request for divestiture because the court found that Congress had not intended divestiture as one of the equitable remedies available under Section 16. Assuming, *arguendo*, that Congress intended to narrow the courts' equitable power in such a manner, any such distinction would be drawn because private citizens act in a strictly proprietary capacity. The statement of Congressman John Floyd indicates that any intent expressed by a member of Congress during the consideration of the Clayton Act was directed at private individuals and not at governments: "We did not intend by Section [16] to give the *individual* the same power to bring a suit to dissolve the corporation that the Government has. . . ." 518 F.2d at 922 (emphasis added). States, which are "government" in the same sense the Department of Justice and Federal Trade Commission are, should be considered "public" parties when acting in their *parens patriae* capacity. Accordingly, all equitable remedies available to the federal government, including divestiture, should be available to the states.

CONCLUSION AND PRAYER

For the foregoing reasons, the Amici States respectfully request that the decision of the Ninth Circuit in the instant case be reversed.

(Footnote continued from previous page)
But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia." *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 447, 65 S.Ct. at 721.

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